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Supreme Court of the United States

OCTOBER TERM—1957.

No. 921.

IRVING KLAW,

Petitioner,

—against—

ROBERT H. SCHAFFER, individually and as Postmaster of the United States Post Office at New York, N. Y.,

Respondent.

PETITIONER'S REPLY BRIEF

JOSEPH E. BRILL,
COLEMAN GANGEL,
Counsel for Petitioner,
165 Broadway,
New York 6, N. Y.
Tel. BEekman 3-6150.

Of Counsel:
JOSEPH E. BRILL,
COLEMAN GANGEL,
SOL JACOBSON.

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STATEMENT

Respondent's brief in opposition to the petition for writ of certiorari states at page 13:

> "Although believing the decision below to be correct, we agree with petitioner that it is in conflict with decisions of the Court of Appeals for the District of Columbia Circuit. Under these circumstances *we would not oppose* certiorari on the issue but for two considerations: the first is the problem of abatement * * *; the second is the fact that the validity of the broad form of order involved in this case now appears to be a matter of no continuing importance." [1]

The purpose of this brief is to demonstrate that the two considerations suggested by respondent are without merit.

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[1] Footnotes omitted, emphasis added.

SUPPLEMENTAL FACTS

After the petition for writ of certiorari was filed on April 12, 1958, counsel for petitioner was informed on May 22, 1958, by the Assistant to the Solicitor General that respondent had resigned from office on May 31, 1957 and that on June 1, 1957, Howard Coonen was designated by the Post Office Department as Regional Operations Director in charge of the Post Office at New York, N. Y.[2]

On or about May 26 ,1958, petitioner filed a motion in this Court to substitute Howard Coonen, the Regional Operations Director, in place of Robert H. Schaffer, the former Postmaster, for whom no successor Postmaster has ever been appointed.[3] Howard Cooner has continuously adopted and still adopts the action of the former Postmaster in enforcing the order of the Postmaster General which is challenged in this action and in the petition for writ of certiorari.[4]

SUMMARY OF ARGUMENT

1. Respondent's first contention that the action has abated rests on the false assumption that the Regional Director is the successor of the Postmaster. It is this error that leads to the untenable argument of abatement. In fact, a successor Postmaster has not as yet been appointed. The Regional Director of the New York Post Office is not respondent's "successor" in office. Consequently, no abatement has occurred under Rule 48 (3) of this Court or Rule 25 (d) of the Federal Rules of Civil Procedure.

2. Respondent's second contention that the Post Office Department's new form of stop order—promulgated only a few days ago on May 29, 1958[5] obviates the statutory and

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[2] Respondent's Brief, pp. 7, 9, footnote 2.

[3] See Petitioner's Motion dated May 23, 1958, and the affidavit of Joseph E. Brill annexed thereto at page 3.

[4] See Appendix A, Respondent's Brief.

[5] See Appendix B, Respondent's Brief.

constitutional objections presented in the petition is in the nature of a confession and avoidance. We accept the confession that the order challenged here is objectionable on statutory and constitutional grounds. But we reject the attempted avoidance that the basic issues are no longer of continuing importance. The problems of the scope of the Postmaster's authority under Title 39 U. S. C. § 259a and under the First Amendment of the U. S. Constitution remain with equal, if not greater, force as against the new form of stop order. Indeed, a significant problem of due process of law under the Fifth Amendment is also raised by this new stop order.

ARGUMENT

I

NO SUCCESSOR HAVING BEEN APPOINTED TO THE OFFICE OF POSTMASTER, THE ACTION HAS NOT ABATED.

Though the respondent has resigned, no successor has been appointed to the *office* of Postmaster of the New York Post Office. The Regional Operations Director now in charge of that post office is not respondent's successor. He was designated by the Post Office Department to take charge until a new Postmaster is appointed.[6]

The distinction between a Postmaster and a Regional Operations Director is clear under the statute. A Postmaster must be appointed by the President by and with the advice and consent of the Senate.[7] The position of Regional Director, on the other hand, is in the classified postal service at Level 20.[8] Surely, a Regional Director in the classified postal service does not succeed to the appointive office of Postmaster.

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[6] See Appendix A, Respondent's Brief.

[7] Title 39 U. S. C. § 31. Judicial notice may be taken that the New York Post Office is in the First Class.

[8] Title 39 U. S. C. §§ 961, 963(49).

Rule 48 (3) of the Revised Rules of the Supreme Court provides in relevant portions as follows:

> "When an officer of the United States * * * or other governmental agency, is a party to a proceeding here, and it is shown that he has * * * resigned * * * the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court, on motion, that there is a substantial need for so continuing and maintaining it."

The language of Rule 25 (d) of the Federal Rules of Civil Procedure is practically identical. Under both rules, petitioner has six months after the successor takes office within which to apply for a substitution of parties. No successor to the Postmaster having been appointed, the six months limitation period has not even begun. Hence, the cases cited by respondent have no application to the case at bar.

The courts do not favor abatement.[9] While petitioner was not required by the rules to file a motion for substitution of parties at this time, he nevertheless filed such motion because the Regional Director has continuously adopted the action of the former Postmaster.[10] An injunction against the former Postmaster would obviously be futile while it would not be futile against the Regional Director who is enforcing the order.

In addition to an injunction, the complaint prays for a declaratory judgment and for judicial review under the Administrative Procedure Act of the Hearing Examiner's determination and its approval by the Post Office Department Solicitor.[11] As to these prayers for relief, the action certainly may be continued and maintained at this time as

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[9] See dissenting opinion in *Snyder* v. *Buck*, 340 U. S. 15; *Poindexter* v. *Folsom* (C. A. 3rd) 242 F. 2d 516.

[10] See Appendix A in Respondent's Brief and affidavit of Petitioner's Counsel, at page 3, annexed to motion of May 23, 1958.

[11] (31a-32a).

stated in Rule 48 (3) of this Court and Rule 25 (d) of the Federal Rules of Civil Procedure. When a successor Postmaster is appointed, petitioner will have six months within which to substitute him for the present respondent. In the meantime, petitioner respectfully prays, in the interests of justice and orderly procedure, that the motion for substitution of parties be granted.

II

CONTINUING IMPORTANCE EXISTS IN THE STATUTORY AND CONSTITUTIONAL QUESTIONS RAISED IN THE PETITION.

On May 29, 1958, the Post Office Department promulgated a new form of stop order which is made available to persons subject to blanket stop orders issued prior to March 26, 1958. While this new form of order does not stop mail which can be identified on the face of the envelope or wrapper as innocent, all other mail will be held for *24 hours* during which time the addressee has the right to examine the mail at a reasonable time in the presence of the Postmaster or in the presence of a postal employee designated by him and to receive such mail as is not connected with proscribed material.[12]

Respondent asserts that continuing importance has disappeared because the new form of stop order "obviously does not raise the statutory and constitutional issues on what petitioner asks this Court to pass".[13] This assertion is without substance for the following reasons:

1. No statutory authority exists for the Postmaster to hold mail subject to an irrevocable determination by him or by a postal employee that it does not relate to proscribed material. The new form of order has neither the legislative sanction nor the judicial safeguards of Title 39 U. S. C.

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[12] See Appendix B of Respondent's Brief.

[13] Respondent's Brief, p. 14.

§ 259b which empowers the Postmaster to enter an interim order directing the impounding of mail pending an administrative hearing. The scope of order that the Postmaster may validly issue under Title 39 U. S. C. § 259a still remains as a problem of continuing importance.

2. If the addressee is unable to appear at the Post Office within 24 hours, he apparently loses his right to all innocent mail where its innocence, according to the Postmaster or a postal employee, does not appear on the face of the envelope or the wrapper. Statutory authority for this severe 24 hour limitation is totally absent. Its enforcement could easily result in the loss of a substantial amount of innocent mail. That this is not a remote possibility is evident from the fact that between 60 to 65% of petitioner's business is wholly unrelated to the subject of the Post Office complaint.[14] The order's time limitation of 24 hours creates a grave threat to innocent mail and is arbitrary and capricious.

3. If the Postmaster, or the postal employee, and the addressee disagree as to whether specific mail is in the lawful or unlawful category, the decision of the Postmaster or the postal employee is presumably irrevocably final. Clearly an action for an injunction on specific pieces of mail could not possibly be brought within a period of 24 hours or less. Thus absolute power is exercised by the Postmaster which in no way can be tested by judicial review.[15] Adjudication prescribed by the Administrative Procedure Act is completely frustrated.[16] This violates due process of law guaranteed by the Fifth Amendment.

4. The new form of stop order is censorship at its worst. Under it, the Postmaster or a postal employee is the sole and

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[14] (39a)

[15] cf. *Stanard* v. *Olesen*, 347 U. S. 590; *Kingsley Books* v. *Brown*, 354 U. S. 436. Also see Title 39 U. S. C. 259b which subjects the Postmaster's interim impounding orders to judicial review.

[16] Title 5 U. S. C. 1004.

final judge on each piece of mail. Release of mail depends entirely on his examination of the mail itself with no opportunity, by reasonable regulations, to offer extrinsic evidence of its innocence. Prior restraint cannot be more sweeping or arbitrary. It even exceeds the type of prior restraint which imposes censorship on a publication before its distribution. The first Amendment of the Constitution prohibits such prior restraint.[17]

CONCLUSION

Among the questions raised in the petition for writ of certiorari are problems involving the scope of the Postmaster's power under Title 39 U. S. C. § 259a and the breadth of administrative action resulting in an unconstitutional prior restraint on innocent mail. Far from avoiding these problems, the new form of stop order brings them into even sharper focus. The petition therefore raises problems of continuing importance and this Court's power of supervision should be exercised.

Dated: New York, June 3, 1958.

Respectfully submitted,

JOSEPH E. BRILL,
COLEMAN GANGEL,
Counsel for Petitioner,
165 Broadway,
New York 6, N. Y.
Tel. BEekman 3-6150.

Of Counsel:
JOSEPH E. BRILL,
COLEMAN GANGEL,
SOL JACOBSON.

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[17] *Near* v. *Minnesota*, 249 U. S. 47; *Lovell* v. *Griffin*, 303 U. S. 444; *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495.

CERTIFICATE OF SERVICE

I, COLEMAN GANGEL, one of the counsel for petitioner in the petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States do hereby certify that on the 3rd day of June, 1958, I served copies of the foregoing reply brief on the respondent, Robert H. Schaffer, individually and as Postmaster of the United States Post Office at New York, N. Y., by causing copies thereof to be mailed in duly addressed envelopes; with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated: June 3rd, 1958.

COLEMAN GANGEL,
Counsel for Petitioner.